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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DARRYL SCOTT,

Petitioner,

v.

WESTERN STATE UNIVERSITY
COLLEGE of LAW,
of SOUTHERN CALIFORNIA, INC.,

Respondents

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is Summary Judgment proper when the court below acts as the jury; determining the non-movant's credibility, weighing the evidence, and deciding upon competing inferences?

Is disparate impact analysis appropriate to analyze subjective criteria in Americans with Disabilities cases?

What constitutes a Due Process and Equal Protection violation in Americans with Disabilities cases?

Should courts below adopt, as recommended by the House Report No. 101-485 (II), the EEOC, and a minority of Circuits, an interactive process in determining what accommodation might be appropriate in Americans with Disabilities cases?

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FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION **Pages 2, 7, 8, 9**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; or shall any person be subject for the same offence to twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION **Pages 2, 7, 9**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty. or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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JURISDICTION

This case was filed in the District Court of Southern California alleging violation of two Federal statutes, 42 U.S.C. 12101 et seq. and 29 U.S.C. 794 et seq. The District Court entered Summary Judgment for Defendant (Appendices, page 2). The case was appealed to the Ninth Circuit Court of Appeals.

The Court of Appeals for the 9th Circuit entered its judgment affirming the lower court on other grounds (Appendices, page 9). A rehearing was denied June 20, 1997 (Appendices, page 13).

This Courts jurisdictional based is 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The instant complaint alleges violation of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. and the Rehabilitation Act (Rehab. Act) 29 U.S.C. 794 et seq. This Petition alleges violation of Plaintiff's rights under the 5th and 14th Amendments to the United States Constitution.

The stated purpose of the ADA, from the preamble to the statute and *House Report No. 101-485 (II) at page 22,* "is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life." The *House Report at page 23* states ,

> "(t)he ADA incorporates many of the standards...set out in...section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in undue hardship... [and] the ADA incorporates by reference...provisions under Title VII of the Civil Rights Act of 1964." In fact "reasonable accommodation is a key requirement of the Rehabilitation and of this Act." (ADA) *Id. at 33*

Justice Kennedy, writing for the unanimous Court, in McKennan v Nashville Banner Pub. Co., 115 S.Ct. 879 (1995), articulates the ADA and the Rehab. Acts are part of a larger Congressional Statutory Construct against invidious bias and are intended to eliminate the last vestiges of discrimination. Justice Kennedy specifies: Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000 et seq.); The ADA (42 U.S.C. 12101 et seq.); The National Labor Relations Act (29 U.S.C. 158); the Equal Pay Act of 1963 (29 U.S.C. 206); and the Age Discrimination in Employment Act (29 U.S.C. 621 et seq.) as major parts of the larger Congressional scheme.

From this Congressional structure courts have incorporated and relied heavily on pre-ADA cases dealing with Title VII and the Rehab. Act for direction in ADA cases.

STATEMENT OF THE CASE

The undisputed facts of the case herein are:

Because Plaintiff scored in the first quartile for all Law School Aptitude Test (LSAT) takers sitting for the exam during the same time, he was awarded a scholarship upon admission to the Defendant's program.

During the first year of law school Plaintiff earned the
American Jurisprudence Award given to the student who scores the highest grade in a course section. This award was earned in a second year course competing against second, third, and fourth year students.

Plaintiff also received a failing grade in one first year class causing his overall Grade Point Average (GPA) to fall 0.005 of a point below the level for continuation into the second year. Defendant's uses a 0 to 4.0 grading structure which defines any grade below a 1.00 as failing. Plaintiff appealed the failing grade. Appeal was an academic avenue available to students during Plaintiff's first semester. Defendant arbitrarily denied this right at the beginning of Plaintiff's second semester retroactive to the

first semester. Following the second semester Plaintiff was notified of his exclusion from the program.

Following exclusion, Plaintiff filed a series of three letters with Defendant. In two Plaintiff described his disability. Each letter from Plaintiff requested Defendant to allow Plaintiff admission to retake the failed course and to continue into his second year. Defendant summarily denied each request with a one page form letter.

Plaintiff also notified Defendant of the solicitation of a letter of verification from his treating physician. This letter was received by Defendant prior to its final refusal to accommodate Plaintiff's disability. Evidence from the Defendant's deposition of Plaintiff's physician determined the Plaintiff was diagnosed as experiencing a "Major Recurring Depressive Disorder with Melancholia" during the first year of law school.

Approximately 12 months after Defendant's final letter of denial Plaintiff filed suit in District Court for Southern California alleging discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. and the Rehabilitation Act 29 U.S.C. 794 et seq.

REASONS FOR GRANTING THE WRIT

If as alleged the courts below and the Defendant have each violated the rights of this civil Plaintiff guaranteed by the Constitution this case is of the utmost importance. This country has long stood for and lectured foreign countries about the rights of the people.

Analyzing the broader meanings and decisions relating to the ADA and the Rehabilitation Acts demonstrate clearly the error of the lower courts. The District Court begins with an order granting summary judgment to the Defendant contradictory to its own stated admonitions to draw credible inferences in favor of the non-movant. The court continues to weigh the evidence and makes a judgment as to the credibility of the Plaintiff by speculating about the Plaintiff's true motive in pursuing this action. Each of these actions are fundamentally contradictory to any established rule pertaining to summary judgment.

The Court of Appeals compounds this error by ignoring whether an accommodation was required, focusing instead on a very narrow and conflicting definition of exclusion "solely by reason of his disability"(Appendices, page 10).

Among the earliest ADA specific cases was Kinney v Yerusalim, 812 F.Supp. 547 (E.D. Pa. 1993), which established the rule that the ADA, as a remedial statute must be "broadly construed to effectuate its purpose." The Court of Appeals herein instead chose the narrowest of interpretations and in so doing deviated from the gravamen of this action, discrimination based on Defendant's failure to accommodate Plaintiff's disability. The decisions below have neither agreed with the logical precedents set; nor have they related to the intention, stated or imputed, of the statutes in question.

Plaintiff asks This Court not to determine what are the facts based on the evidence herein, rather whether the facts were interpreted fairly and properly by the courts below. The trier of fact should properly be the jury, here the court put itself in that position. If one asks whether this judgment meets the requirements of summary judgment the answer is an unequivocal no. The District Court and the Court of Appeals rulings herein are in monumental conflict with rulings from within the Ninth Circuit, from other circuits, and from This Court.

From the Emancipation Proclamation to the Americans with Disabilities Act the goal of our democracy has been the attainment of equality for all people. To paraphrase the comments of Justice Kennedy, applying his reference to the Congressional Statutory construction of civil rights legislation, in McKennan, Id. at 885 "(t)he objectives of the [ADA] are furthered when even a single [Plaintiff] established that [a Defendant] has discriminated against him or her."

The law plays many roles in society. Among the most prominent are maintaining a stable commerce and assuring the strong do not prey upon the weak. To avoid judicial gridlock the courts must expedite whenever

possible. However, the courts must not allow themselves to profit from one at the expense of the other however.

PROCEEDINGS BELOW

The proceedings below from which this appeal is taken are: a Discovery Hearing, the District Court Granting of Defendant's Summary Judgment and the Court of Appeals affirmation of the Summary Judgment on other grounds.

On February 5, 1996, a Discovery Hearing was held before Magistrate Judge Porter. At this hearing the Defendant successfully argued, inter alia, grades and grading were not relevant to the proceedings. The District Court agreed ruling this information relating to the subjective nature of grades was irrelevant. The Court of Appeals later ruled Plaintiff was not "otherwise qualified" for Defendant's program because Plaintiff "...did not maintain the GPA required to continue at WSU (Defendant)..." (Appendices page 10).

Of some thirty requests in the form of interrogatories and requests for documents the District Court ruled against the Plaintiff in all but one. The single piece of discovery provided by Defendant was Plaintiff's personal student file, which would be available to Plaintiff outside of this litigation, which included the item at Appendices, page 14. This page, black but for a square with a partial stamp used by the Defendant to state the original of the document was on file at the Defendant, was ordered to be turned over to Plaintiff in unadulterated form. Defendant later stated in its reply to Plaintiff's appeal of summary judgment this page had not been "...withheld, deleted or redacted...or that anything other than what is contained on the original of (Appendices, page 14) is different than the one which [Plaintiff] received."

Plaintiff requested discovery of information regarding students admitted to Defendant's program after expulsion, specific to two cases known to Plaintiff to be students similarly situated to Plaintiff. Plaintiff's argument

this would lead to direct evidence of disparate treatment was ignored by the district court.

On June 7, 1996, the Honorable Judith Keep, Chief Judge of the District Court for the Southern District of California, entered an ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Appendices, page 2). This order was granted without, as Plaintiff requested, oral argument. Plaintiff had requested oral argument to assure the meaning of Plaintiff's arguments would be understood by the court. The court, ruling on the Plaintiff credibility, stated the Plaintiff did not actually seek an accommodation "...but rather a windfall damage award..." Id. at page 7)

From the District Court's order Plaintiff timely appealed to the Court of Appeals for the Ninth Circuit. Again Plaintiff requested oral argument and was denied. The Court of Appeals entered judgment affirming the District Court on April 25, 1997. The Court of Appeals, citing Dempsey v Ladd, 840 F.2d 638, 640 (9th Cir. 1988), and Southwestern Community College v Davis, 442 US 397, 406, 99 S.Ct. 2361, 2367 (1979), ruled "(b)ecause Scott did not maintain the GPA required to continue at WSU, it is indisputable that he was not 'otherwise qualified for the services sought.'"(Appendices, page 10). The Appeals court continued at page 3 of its Memorandum, "any modification in WSU's practices would 'fundamentally alter the nature of [its]...services."

A petition for rehearing was denied June 20, 1997.

All judgments below are unpublished.

Plaintiff comes now properly to this court of last resort properly to appeal the judgments below and to ask this court to remand this case to the district court for determination on the merits of the case.

GRANTING SUMMARY JUDGMENT VIOLATES PLAINTIFF'S DUE PROCESS and EQUAL PROTECTION RIGHTS

Plaintiff alleges the proceedings below violate Plaintiff's rights under the 5th-Due Process, and 14th-Equal

Protection Amendments to the United States Constitution. Plaintiff further alleges the actions of the Defendant violate Plaintiff's rights under the 5th and 14th Amendments to the United States Constitution. This Court has consistently ruled a liberty or property interest must be at stake to invoke the protections of the 5th and 14th Amendments. Each are at issue herein.

This Court in Board of Curators of University of Missouri v Horowitz, 435 US 78, 84, 98 S.Ct. 948, 952 (1978), recognized but failed to rule on whether the University "deprived her of a liberty interest in pursuing a medical career" by failing to allow her continuation in the University's program. In Horowitz, respondent was a medical school student expelled from the University.

The Court revisited this issue some years later in Regents of University of Michigan v Ewing, 474 US 214, 225, 226, 106 S.Ct. 507, 513 (1985), to say the question in substantive due process claims is "whether the record compels the conclusion that the University acted arbitrarily...[not] conscientiously and with careful deliberation, based on an evaluation of [all available evidence]".

In the application of due process to ADA cases, the Second Circuit in Dennin v Conn. Interscholastic Athletic Conf., 913 F.Supp. 663 (D.Conn. 1996), at 671 held due process requires a "...meaningful, individualized inquiry into the Plaintiff's request. This includes consideration whether any stated purpose of rules are implicated by Plaintiff's participation."

Herein the discovery of Plaintiff's student records offers no evidence the Defendant made any inquiry whatever into Plaintiff's disability or request for accommodation. The Defendant responded with single page form letters to Plaintiff's requests. Had the information contained at Appendices, page 14 been disclosed to Plaintiff it might hold some clue to Defendant's deliberation. However, Defendant convinced the court below this page had not been "...withheld, deleted or redacted...or that anything other than what is contained on the original (of Appendices, page 14) is different than the

one which [Plaintiff] received." Plaintiff's argument that the Defendant's explanation defies logic, why would the original of a substantially black document be on file at the University, and that the thing speaks for itself was ignored by the District Court and the Court of Appeals.

The courts have been cautious of interference in the rights of academia. As Justice Frankfurter notes in Sweezy v New Hampshire, 54 US 234 (1957), colleges are free to determine: 1) who may be taught; 2) what may be taught; 3) how to teach; and 4) who may teach. However, This Court sits in an unique position regarding law schools. In addition to having an in depth understanding of the rigors of legal education the courts are caretakers of the legal community and who may sit at the bar. Consider further the Defendant is a private school in the business of academics. Each of its decisions are not purely academic, having as a dominant element a financial motive. Additionally, during the time at issue Defendant was applying for ABA accreditation which would have improved its reputation and ability to raise tuition.

As in Horowitz, the community of law schools, like medical schools, is a limited one with schools of varied reputation. Because, at the time of Plaintiff's attendance WSU (defendant herein) was not an American Bar Association accredited school it was viewed as a lower echelon school. To be excluded from one casts doubt on the credentials of a person seeking admission to others. Defendant's alleged discriminatory exclusion of Plaintiff herein increased the difficulty for Plaintiff to gain admission to any other law school to the level of impossibility.

Herein the attainment of a law degree is a concrete and particular property interest. A J.D. or LL.M. is a tangible asset providing the bearer with rights not available to others. Whether in the practice of law or by creating opportunities in a corporate environment, an advanced degree would improve Plaintiff's future earning power. As pointed out in Plaintiff's First Amended Complaint, statistics from the US Department of Commerce indicate the income improvement for an individual with a Bachelor Degree and

a Post Graduate Degree is approximately $30,000.00 per year over a Bachelor Degree alone.

This Court in Ararand Constructor, Inc. v Pena, 115 S.Ct. 2097 (1995), ruled in a Title VII case invoking both 5th and 14th Amendment violations, that a Plaintiff may have standing to seek forward-looking relief. In Ararand the basis was petitioner's probability of bidding on future contracts that would bear future earnings. At 2105 the Court ruled the aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing."

This Court in US v Diebold, Inc., 369 US 654, 82 S.Ct. 993 (1962), first instructed the courts "(o)n summary judgment the inferences to be drawn from the underlying facts...must be viewed in the light most favorable to the party opposing the motion." From this statement the courts below have strictly interpreted the "...must be viewed..." admonition to maintain a pattern of "analysis" in a light most favorable to the party opposing the summary judgment.

The court in Aka v Washington Hosp. Center, 116 F.3d 876 (DC Cir. 1997), discussing the dissent filed, cautions in summary judgment motions the court must not put itself in the position of reasonable fact finder by basing decisions on its own weighing of the evidence. Aramburu v Boeing, Co., 911 F.Supp. 1377, 1383 (D.Kan. 1995), is affirming, stating summary judgment is not a chance for the "court to act as the jury and determine witness credibility, weigh the evidence, or decide upon competing inferences."

In the instant case the district court in its "ORDER GRANTING...SUMMARY JUDGMENT" provided little but passing reference to the Plaintiff's case while quoting Defendant repeatedly. (Appendices, page 2: direct quotes of Defendant's brief and supporting papers for Motion for Summary Judgment-18; from Plaintiff's brief in opposition to Summary Judgment and supporting papers-0). The district court herein placed itself in the very role of finder of the facts, weigher of the evidence, and determiner of the credibility of the Plaintiff. The district court concludes "readmission is not an accommodation". This ignores the question of fact of any possible alteration the Defendant

might make to its ordinary rules in so allowing readmission (Appendices, page 7). The court continues by weighing the evidence to impute the defense theory of sinister intent to the "favor" requested of Plaintiff's physician by Plaintiff to provide a letter confirming Plaintiff's disability (Id. at page 2). Additionally, the statement "the court is left to speculate that what Plaintiff actually seeks with his lawsuit...a windfall damage award of $3,692,000" is clearly a judgment of the credibility of the Plaintiff (Id. at page 7).

Courts have unanimously adopted the rule that the ADA carries an inference of discrimination when the prima facie case is established. The circuit for the District of Columbia ruled in Aka at 879-880 as to discrimination cases "summary judgment motions must be given added rigor bearing in mind the inference of discrimination even absent crystal-clear evidence and consideration of the McDonnell Douglas burden switching criteria."

In McDonnell Douglas v Green, 411 US 792, 93 S.Ct. 1817 (1973), and TX Dept. of Community Affairs v Burdine, 450 US 248, 101 S.Ct. 1089 (1981) This Court places upon the Defendant the burden of providing a non-discriminatory, non-pretextual reason for the action in question, when the Plaintiff establishes a prima facie case. This Court's ruling in Trans World Airlines, Inc. v Thurston, 469 US 111, 105 S.Ct. 613 (1985), is directly applicable to the instant case: "the shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the Plaintiff [has] his day in court despite the unavailability of direct evidence."

In St. Mary's Honor Center v Hicks, 509 US 502, 113 S.Ct. 2742 (1993), This Court clarified the application of the McDonnell Douglas/Burdine analysis. When the Plaintiff establishes its prima facie case, the burden shifts to the Defendant who then must present evidence of a legitimate non-pretextual explanation for its action. If the Defendant is successful, the shift then is back to Plaintiff who "must be given a full and fair opportunity to demonstrate by competent evidence that the..." discrimination was real. Confusion among the Circuits is discussed by the court in Aka, noting the differing

opinions among the circuits regarding the application of the McDonnell Douglas test after This Courts decision in Hicks. Roughly half of all circuits have adopted McDonnell Douglas as a test in ADA cases.

This Court in Hicks at 2748 ruled the court must find for the non-movant in summary judgment when "...the court is asked to decide whether an issue of fact remains for the trier of fact to determine...on the evidence presented (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the [movant] has failed to meet its burden of production-i.e., has failed to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action."

In the instant case Plaintiff offers the following facts known to the Defendant and presented to the district court prior to the granting of the motion for summary judgment regarding his prima facie case:

1) Defendant's deposition of Plaintiff's physician established Plaintiff suffered a "Major Recurring Depressive Disorder with Melancholia" during the first year of law school;
2) The Plaintiff offered numerous facts raising a reasonable question of fact that Plaintiff was "otherwise qualified" for Defendant's program;
3) The effect of Plaintiff's disability raised a reasonably question of fact whether it could be interpreted to have lead to Plaintiff's exclusion.
4) Defendant had previously argued in the discovery hearing its proffered explanation for its actions, grades and grading was irrelevant to this case.

Plaintiff alerts This Court in neither the ORDER GRANTING...SUMMARY JUDGMENT nor MEMORANDUM of the appellate court is the question of Plaintiff's prima facie evidence properly adjudicated. In each the bases for judgment have been in conflict with case law from within the 9th Circuit, from other Circuits, the Supreme Court as well as the legislative history of the ADA.

SUMMARY JUDGMENT HEREIN CONFLICTS WITH DECISIONS OF THIS COURT, THE NINTH CIRCUIT AND AMONG AND WITHIN THE DISTRICTS

The ADA states the elements of a prima facie case:

1) Is the Plaintiff a handicapped person under the Act?

2) Is the Plaintiff "otherwise qualified" for participation in the program?

3) Is the Plaintiff being excluded from participation in, being denied the benefit of, or being subjected to discrimination solely by reason of his handicap?

4) Is the relevant program or activity receiving Federal financial assistance? (This element is not at issue and need not be discussed.)

Many district courts have spent considerable dicta in recent cases noting conflict among the Circuits and asking for direction in ADA cases. The lower courts seem to have been left to their own devices in decisions regarding the ADA. Among the issues for which the district courts repeatedly pray for direction: conflicts with state law; how to test whether an impairment is substantially limiting; and what constitutes a prima facie case.

While the statute makes clear the definition of a prima facie case under the ADA and by reference the Rehab. Act. the courts are not in agreement. Many courts have established their own usable versions of what may establish a prima facie case and what defines the varied elements therein.

In Muller v Hotsy Corp., 917 F.Supp 1389, 1410 (N.D. Iowa 1996), the court states, "...finding themselves left without precise guidelines from the circuit courts of appeals...the district courts have hit upon two possible formulas [to establish a prima facie case]" from a "sampling of recent ADA decisions":

Courts in Pennsylvania, Louisiana, Missouri, and Alabama have adopted;

1. Is Plaintiff disabled under the ADA?
2. Is Plaintiff a "qualified individual" under the ADA?
3. Was Plaintiff subjected to an adverse decision?

and 4. Was Plaintiff treated less favorably than a non-disabled person?

Another group of courts uses the examples devised by the decisions in Ricks v Xerox Corp., 877 F.Supp. 1468 (D.Kan. 1995), and Howe v Hull, 873 F.Supp. 72 (N.D. Ohio 1994);

1. Is he/she disabled within under the ADA?
2. Is he/she qualified with or without a reasonable accommodation?

and 3. Was he/she subjected to an adverse decision because of a disability?

The Second Circuit in Mohamed v Marriot Intern., Inc., 905 F.Supp. 141 (S.D. NY 1995), prescribes the following test;

1. Is Plaintiff a qualified individual with a disability?
2. Did Plaintiff suffer an adverse action?

and 3. Does a causal connection exist between the adverse action and the disability?

Had either the district court or the court of appeals applied any of the aforementioned tests to the facts presented to them by the Plaintiff, herein at page 10, it is clear the decision by the courts should have been the denial of summary judgment. Both decisions below are devoid of any discussion of the evidence put forth by the Plaintiff. The district court relies exclusively on the Defendants telling of the evidence while the court of appeals focus is off the issue of Defendant's obligation to provide reasonable accommodation.

Confusion surrounds the individual elements as well. This Court in School Board of Nassau County Florida v Arline, 480 US 273, 107 S.Ct. 1123 (1987), ruled regarding the second element of the prima facie case that to be "otherwise qualified" the Plaintiff must satisfy the requisite skills, experience, education and other job related requirements with or without accommodation.

The Second Circuit in Aquinas v Federal Express Corp., 940 F.Supp. 73 (S.D. NY 1996), offers the following: t:

1. Analyze the essential functions of the job.

2. Analyze the Plaintiff's ability to perform the essential functions;

a) without accommodation

b) with accommodation

then 3. Analyze whether accommodation is reasonable.

The Ninth Circuit in Hirschhorn v Sizzler Restaurants Int'l., Inc., 913 F.Supp. 1393 (D. Nev. 1995), measures differently:

1. Determine if Plaintiff can satisfy the prerequisites of the position.

then 2. Determine is Plaintiff can perform essential functions of the position,

a) without accommodation.

b) with accommodation.

A case from the 6th Circuit Maddox v University of Tennessee, 907 F.Supp. 1144 (E.D. Tenn. 1994), at 1149-1150 ruled "whether Plaintiff is 'otherwise qualified' depends on whether he or she can meet the necessary requirements...what are the necessary requirements... depend on the extent to which the [Defendant] can satisfy the legitimate interests of both itself and the [Plaintiff]."

A common thread woven through each of the above analyses is the question of "essential functions" of the job at issue. The House Report No. 101-485 (II) at page 55 defines an "essential function" as the "...tasks that are fundamental and not marginal." This Court in Arline, at 287 ruled essential functions are those "that bear more than a marginal relationship to the job at issue." In Palmer v Circuit Court of Cook County, Soc. Serv., 905 F.Supp. 499, 508 (N.D. Ill. 1995), the court found the "question of essential function of a job turns on whether removing the function would fundamentally alter the position."

The Court of Appeals herein cites This Courts ruling in Davis, Id. "a person with a disability is otherwise qualified if he 'is able to meet all of a program's requirements in spite of his handicap.'" The 5th Circuit, however, is correct to point out in Brennan v Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988), "Courts cannot apply the Davis test to all the requirements; if they did no reasonable requirement could

ever violate section 504, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it."

Returning to Dennin, Id. at 668 the court points out "it would be anathema to the goals of the Rehabilitation Act [and by incorporation the ADA] to decline to require an individual analysis of the [rule at issue]." In Dennin the court dealt with a mentally retarded student requesting to play interscholastic sports at the age of 19, which was forbidden by the Defendant's rules. The court further notes "if a rule can be modified without doing violence to its essential purpose...it cannot be essential to the nature of the program or activity." Id. at 668 In Dennin the court ruled the disability created the circumstances engaging the rule and allowing an accommodation would not provide the Plaintiff any advantage over others in the program. See Post at page 19.

Compare these definitions to the ruling herein by the Court of Appeals for the Ninth Circuit, "(b)ecause Scott did not maintain the GPA required to continue at WSU, it is indisputable that he was not 'otherwise qualified for the services sought.'"(Appendices, page 10) The issues become: whether a predominantly subjective grading scale bears "a marginal relationship" to items more closely associated with college or university study, i.e. the ability to read, write, and attend classes; would Defendant's rules be jeopardized by allowing the Plaintiff that which was allowed others; and should grades withstand a disparate impact analysis?

Consider also the Defendant's "Statement of Purpose" published annually in its student handbook. This statement includes in part:

> "(t)he school shall not...enroll or continue a person whose inability to do satisfactory work is sufficiently manifest that the person's continuance would inculcate false hopes, constitute economic exploitation, or deleteriously affect the education of other students."

From this mission statement one would conclude the school believes its actions, to exclude those it considers unable, to be in the benevolent guardianship interests of plebeian

adults incapable of applying their own personal and financial judgment. The question remains whether a 0.005 GPA shortfall meets the Universities stated purpose above of a sufficient manifestation of an inability to perform satisfactorily.

Referring to the ruling by the Court of Appeals herein, while the issue of grades has not been adjudicated, This Court has spoken to the issue of the use of subjective criteria. Justice O'Connor writing for This Court in Watson v Fort Worth Bank & Trust, 487 US 977, 990, 108 S.Ct. 2777, 2786 (1988), ruled "disparate impact analysis is...no less applicable to subjective...criteria than to objective or standardized tests. In either case a facially neutral practice adopted without discriminatory intent may have effect that are undistinguishable from intentionally discriminatory practices." The Ninth Circuit Court of Appeals used the same rationale earlier in Nanty v Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981), "subjective...criteria present potential for serious abuse ...also provides a convenient pretext for discriminatory practices." When grades vary from section to section and instructor to instructor for the same material covered, they have elements that are subjective and therefore fall within the purview of disparate impact analysis.

Regarding disparate impact This Courts in Price Waterhouse v Hopkins, 490 US 228, 109 S.Ct. 1775, 1785 (1989), cites the 110 Cong. Rec. 7213 (1964),

> "(t)o discriminate is to make a distinction, to make a difference in treatment or favor, and these distinctions or differences in treatment or favor which are prohibited...are those which are based on...the forbidden criteria."

The court in Mohamed, Id. at 154 brings disparate impact analysis into the realm of the ADA,

> "(t)he ADA does not explicitly set out a claim for disparate treatment, which is generally associated with Title VII. (The ADA) is also, however based closely on Title VII. Much of the wording is the same. Courts in interpreting the ADA have been quick to apply precedent set under Title VII."

As applied to the instant case the Plaintiff twice provided evidence to the court below of the existence of disparate treatment. Defendant does not deny having allowed admission to other students excluded, apparently just not this Plaintiff. Plaintiff's requested discovery in this area was denied by the District Court.

The third element of the prima facie case: Is the Plaintiff being excluded from participation in, being denied the benefit of, or being subjected to discrimination solely by reason of his handicap? The District Court and the Court of Appeals herein are not synchronized on this issue. The District Court deals with the accommodation question while the Court of Appeals focuses on discrimination. The gravamen of Plaintiff's complaint referred to the lack of reasonable accommodation required to be provided by the Defendant.

The House Report Id. at page 33 states that reasonable accommodation is a key requirement of the Rehabilitation Act and of the ADA. As stated earlier The House Report Id. at page 23 "(t)he ADA incorporates many of the standards...set out in...section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodation unless it would result in undue hardship.

The courts have not set any tests of what constitutes an undue hardship. In Cook v State of R.I. Dept. of MHRH, 10 F.3d 17, 29 (1st Cir. 1993), the 1st Circuit left the question open saying "defendant must absorb some costs of making accommodations unless costs rise to the level of 'otherwise qualified' lacking."

Apparently this refers to a situation whereby defendant would absorb the costs of making some alteration to the "fundamental or essential nature of the program," which the ADA and Rehab. Acts do not require. Here the court misspeaks, the more proper test would be:

> that the defendant must absorb all costs of making an accommodation unless said costs rise to the level of an alteration in the "fundamental or essential nature of the program."

The statutes make no mention of any costs being borne by the disabled, the party for whom the protection is designed.

The latter statement more closely reflects the ruling in Strathie v Dept. of Trans., 716 F.2d 227, 231 (3d Cir. 1983), when the court says:

> a "handicapped individual who cannot meet all of a programs requirements is not otherwise qualified if there is a factual basis in the record reasonably demonstrating that accommodating that individual would require either a modification of the essential nature of the program, or would impose an undue burden on the recipient of Federal funds."

Strathie leaves open the question of what constitutes undue hardship.

The district court herein adopts the ruling in Siefken v Village of Arlington Heights, 65 F.3d 664,666 (7th Cir. 1995), "(a)n accommodation is something concrete–some specific action required of the [defendant]" and Vande Zande v State of Wis. Dep't of Admin., 44 F.3d 538,543 (7th Cir. 1995), "[i]t is plain enough what 'accommodation' means. The [defendant] must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work."

The Ninth Circuit Court of Appeals speaks to (Appendices, page 10) "...any modification of WSU's practices would 'fundamentally alter the nature of [its]...services'." and "...there is no requirement that educational institutions lower or substantially modify their standards to accommodate students' disabilities." Herein the Plaintiff questions the causal connection between the Courts ruling and the reality of the accommodation requested.

Plaintiff asked Defendant to allow, based on his disability, that which Defendant had allowed others. Had Defendant never made such "accommodation" to disabled or non-disabled students in the past, which contradicts logic and Defendant's own statements, perhaps a "fundamental alteration" would result. However the courts have consistently ruled, until this case, some modification is required but for the standards set forth. Consider further

that Defendant, a private college providing education on a for profit basis, would have profited by whatever portion of tuition remains as profit.

Plaintiff would draw This Court attention to the issue of "accommodation", particularly how it is to be determined between the parties.

The majority of courts have accepted the ruling in Barth v Gelb, 2 F.3d 1180 (DC Cir. 1993), that the Plaintiff must describe the accommodation necessary. The 11th Circuit has taken the step in Willis v Conopco, Inc., 108 F.3d 282 (11th Cir. 1997), to rule the [defendant] has no duty to investigate accommodations, and in Fussell v Georgia Ports Authority, 906 F.Supp. 1561, 1570 (S.D. GA 1995), "Plaintiff must show the existence of a plausible accommodation, the costs of which do not clearly exceed the benefits." Turco v Hoechst Celanese Chemical Group, Inc., 906 F.Supp. 1120 (S.D. TX 1995), increases the burden on the plaintiff because the ADA does not require the Defendant to accept the accommodation Plaintiff may desire. In Leslie v St. Vincent New Hope, Inc., 916 F.Supp 879 (S.D. Ind. 1996), the court ruled that an accommodation need only be reasonable, not exactly what the Plaintiff requests."

In contrast a minority of courts have opened the analysis to an interactive process between the parties designed to achieve some compromise of what is an appropriate accommodation. The 7th Circuit in Beck v Univ. of WI Board of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996), cites 29 C.F.R. pt. 1630, App. "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the [parties]...once [defendant] knows of [plaintiff's] disability...the regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary." The House Report No. 101-485 (II) at page
65-66 clarifies the intended position of the courts "(t)he committee suggests that, after a request for an accommodation has been made, employers first will consult

with and involve the individual with a disability in deciding on the appropriate accommodations."

Applying the majority rule, the courts place the sole responsibility on the disabled individual to enunciate an exact accommodation whose cost does not rise to the level of undue hardship. The defendant then has the alternative to disregard the request without making further investigation of accommodations appropriate to the situation. This situation places the greatest burden on the weaker party, and allows the stronger party time to calculate an escape from the requirements of the statutes. The hypothetical scenario would be:

1) Plaintiff makes a request of specific accommodation.
2) Defendant has three options;
   a) Accept the request.
   b) Calculate why the request amounts to an undue hardship.
   or c) Offer its own accommodation which must be accepted because refusal would result in no discrimination.

The minority rule in Beck more closely reflects, if not the requirements, the spirit embodied in the ADA. Consider that the ADA specifically targets individuals outside the "economic and social mainstream of American life" as well as individuals with mental disabilities. Should This Court legitimately expect individuals on the lower rungs of society to calculate not only what is in their best interest but also that of institutions included within the statutory landscape? By opening the process to interaction between the parties the weaker party may be afforded the opportunity to include physicians, guardians and the like to assist in the protection of the disabled persons rights. At no time did the Defendant attempt to contact the Plaintiff to request more information or any clarification. Everything done prior to the instigation of this action was by the impetus of the Plaintiff.

In the instant case discussion in briefs and the ruling of the District Court has revolved around the accommodation question. To reiterate the facts known to the Defendant and the courts below:

Plaintiff requested, three times, to be admitted into Defendant's program of study to continue into the second year and to have the opportunity to retake the only class in which Plaintiff received a failing grade his first year in law school.

Admission after exclusion was understood by Plaintiff to be against Defendant's standard rules.

At this same time Defendant was seeking to become an ABA accredited school which was granted shortly following commencement of this action.

In response to Plaintiff's requests Defendant generated one page form letters, reflecting no reasoning, denying all requests.

Following commencement of this action a Settlement Conference was held October 11, 1995. At this hearing the Honorable District Court Judge Moskowitz recommended that Defendant accept the accommodation requested by the Plaintiff. The Defendant through its attorney in a letter dated October 12, 1995 states "...my client would make a recommendation to the Admissions Committee to readmit [Plaintiff] to the University during the Spring, 1996 semester."

With reference to Appendices, page 15 et. al. Plaintiff explained to the court that Defendants accommodation as worded effectively was that which Plaintiff had previously accomplished on his own. Plaintiff then informed the district court the offer of "accommodation" in question was retracted before Plaintiff could respond (Id. at page 17). However, the District Court Order continues (Appendices, page 7) "Plaintiff provides no explanation for his refusal to accept the ...'accommodation'..."

Consider the definitions of accommodation favored by the courts and the Defendant herein. Can an offer to make a recommendation to a committee which had declined Plaintiff's requests numerous times previously be understood as within the definitions or the statutory interpretation of "accommodation"?

The 7th Circuit ruled "normally the determination or whether an offer of accommodation...is reasonable is a

question of fact." Dyer v Jefferson County School Dist., 905 F.Supp. 864, 870 (N.D. Ill. 1994). The 11th Circuit adds that the question of whether an offer is a bona-fide offer or simply a method for the Defendant to undermine the Plaintiff's case is a question for the jury. Thomas v Dillard Dept. Stores, Inc., 116 F.3d 1432 (11th Cir. 1997)

Assuming arguendo, the Plaintiff has shown, from evidence and argument put forth above, his prima facie case. Because the ADA carries with it an inference of discrimination the court would apply the burden switching criteria delineated by This Court in McDonnell Douglas and Burdine. The burden of proof switches to the Defendant to articulate a legitimate non-discriminatory reason for the adverse action. If the Defendant is successful the shift is back to the Plaintiff who "must be given a full and fair opportunity to demonstrate by competent evidence that the...discrimination was real" as indicated previously in Hicks, Id.

Herein the courts accepted the Defendant's explanation for exclusion of the Plaintiff without question. Plaintiff argued:

Plaintiff's disability was the determining factor leading to exclusion;

Plaintiff's disability required accommodation, which is the real issue;

Grading is a subjective measure varying from instructor to instructor and class to class; and

Defendant had allowed admission to at numerous other students similarly situated.

The question of Defendant's articulation of a legitimate reason is met with two restrictions: the defendant "must clearly set forth, through the introduction of admissible evidence..." reasons for its actions. Burdine, Id. at 254-255 also Washington v HCA Health Services of TX, 906 F.Supp 386, 391 (S.D. TX 1995), "While [Defendant] need not prove the legitimate reason, it must product some evidence to support it."; and, as adopted by the Ninth Circuit, the reasons can not be mere pretext for discrimination.

A number of circuits have ruled in ADA cases an individual "can be terminated because of actions caused by their disability." Newland v Dalton, 81 F.3d 904 (9th Cir. 1996. However, the defendant "must point to behavior that is not causally related to the [Plaintiff's] handicap." Husowitz v Runyon, 942 F.Supp. 822, 832 (E.D. NY 1996). For example, a law school student, an alcoholic, physically threatened a classmate and an instructor, was readmitted to the University three times earning a failing GPA each time was excluded for the threats not his deficient GPA. Anderson v University of Wisconsin, 841 F.2d 737 (7th Cir. 1988). The Defendant herein offers no such claim nor evidence of behavior detrimental to the University, its students or faculty.

> "In determining whether the [defendants] articulated rationale is pretextual, the district court must weigh and resolve not only what information was known to [defendant] at the time, but also the plausibility of its explanations in light of all the evidence and the inconsistencies of these explanations over time." Norris v City and County of San Francisco, 900 F.2d 1326 (9th Cir. 1990).

The same court many years earlier noted "(s)ubjective...criteria...also provides a convenient pretext for discriminary practices." Nanty, Id. at 1334.

The 11th Circuit accepting the rationale of the 7th Circuit in Hamm v Runyon, 51 F.3d 721 (7th Cir. 1995), says the "key part of Plaintiff's case is showing the Defendant had knowledge and a causal relationship between the handicap and the adverse event." Mears v Gulfstream Aerospace Corp., 905 F.Supp. 1075 (S.D. GA 1995).

Herein the Plaintiff alleged his disability had a direct causal connection to the exclusion by Defendant. Plaintiff offered as evidence to the district court the Defendant's Deposition testimony of Plaintiff's physician regarding the severity of Plaintiff's disability during the time in question and the limiting effects thereof. "(D)ischarge for performance inadequacies resulting from the disabilities, amounts to a discharge solely because of the disabilities."

Borkowski v Valley Central School District, 63 F.3d 131, 143 (2d Cir. 1995). The 11th Circuit ruled the Plaintiff "can show discrimination under the ADA by showing they had been treated differently...or that they suffered an adverse ...decision because of their disability". Lewis v Zilog Inc., 908 F.Supp 931, 948 (N.D. GA, 1995)

The District Court and the Court of Appeals below accepted the Defendant's argument that exclusion was based solely on Plaintiff's deficient grade point average. Both courts saw no pretext. However, Defendant's argument that Plaintiff's exclusion was solely because of grades fails at many points:

Grading, having subjective elements, must withstand the disparate impact test;
Defendant has allowed admission to other students similarly situated;
Defendant argued grades and grading were not relevant to these proceedings;
A deviation of 0.005 of one point or 1/8th of one percent is well within the standard of error for a subjective grading system;
finally, The question of whether grades are an "essential function" of participation in Defendant's program.

The Defendant, the District Court, and the Court of Appeals have cast great weight on the fact the Plaintiff had not mentioned his disability until some five months after being dismissed from Defendant's program. The District Court notes until this time Defendant had no duty to accommodate the Plaintiff, the district court fails to determine if at this later date the duty to accommodate arose. The Court of Appeals ignored this question completely.

There exists one fundamental truth of all cases: a proximate relationship between the parties. The issue becomes, was notice timely? I believe the circumstances surrounding this issue, timely notice, are of first impression to This Court.

When one considers the nature of academia in the instant context the question is whether Plaintiff's actions

after exclusion were so far from the norm as to be a complete bar to the instant suite. Plaintiff did what This Court should understand any student would have done seeing many thousands of dollars being swept away by a capricious decision. Plaintiff wrote a letter to Defendant characterizing the discrepancy between inclusion and exclusion as so slight to warrant some consideration. This tack was designed to appeal to Defendant's sense of fairness and humanity.

Finding no inroads, Plaintiff described the connection between his exclusion and his long term disability. Defendant later argued to the court below Plaintiff created his disability from whole cloth to further his suit herein. This assertion is without merit because Plaintiff had been treated for this disability specifically during his time at University. Also consider Plaintiff's explanation to the Defendant of his disability as "bipolar depression". Terminology which should have been recognized as a probable disability by individuals with the credentials and level of sophistication as those who manage a law school. Instead Defendant seized on this as Plaintiff's attempt to disguise the truth of his disability.

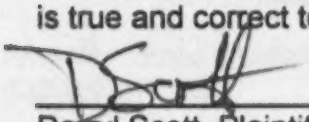
The Defendant's responses, one page form letters, to the series of Plaintiff's correspondence are clear evidence someone within the University recognized Plaintiff's request as an application for admission. Each include the following:

> "The Admission Committee has reviewed your (application)(petition)...for readmission." and
>
> "The Committee (has) denied your request"

Therefore, if Defendant knew of Plaintiff's disability, as evidence shows, and excluded him having such knowledge, a questions of fact, accommodation was required and Plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the" discrimination was real. Hicks, Id. at 2748.

CONCLUSION

For the foregoing reasons, Petitioner asks This court to grant this petition for a writ of certiorari. Respectfully submitted this 15th day of September, 1997. Plaintiff swears under the penalty of perjury all included in this writ is true and correct to the best of his knowledge.



Darryl Scott, Plaintiff

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Darryl Scott, Plaintiff,	Civil Case No. 95-1056-K (POR)
v.	ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
Western State University College of Law, Defendant.	

Defendant Western State University College of Law ("Western State") brings this motion for summary judgment. Plaintiff Darryl Scott, proceeding pro se,[1] opposes.[2]

Factual Background

From August 1992 through June 1993, Plaintiff Darryl Scott was a first-year law student at Defendant Western State. After the Fall 1992 semester, Western State placed Plaintiff on academic probation. Keller Decl. Exh. 1. Plaintiff completed his first year of law school at Western State with a cumulative grade point average("GPA")of 1.89. Id. Exh. 2. As a result, Defendant dismissed Plaintiff from school for failure to maintain the required GPA of 2.0. Id. Exh. 3. Of the eight courses Plaintiff completed during his first and second semesters at Western State, he received a grade of 2.0 or less in seven of them. Id. Exh. 2.

From June 1993 through March 1994, Plaintiff sought to be readmitted to Western State. On June 26 and

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[1] On March 11, 1996, the court gave notice to Plaintiff of this motion for summary judgment, pursuant to Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

[2] Pursuant to Local Rule 7.1(d)(1), this motion was decided without oral argument. USDC So. DIST. OF CAL. R. 7.1 (d)(1)(June 1995).

29, 1993, Plaintiff wrote letters to Western State requesting that it allow him an opportunity "to improve [his] performance such as to erase [his] dismissal" and permit him to retake the course he failed. Id. Exhs. 4-5. On November 9, 1993, Plaintiff wrote to Western State again, requesting that it admit him in the Spring 1994 semester. Id. Exh. 6. In this letter, Plaintiff for he first time mentions an alleged disability, stating that he has been treated "for the past two decades for a condition which effects [sic][his] memory, reading comprehension and ability to concentrate." Id. Prior to this letter, Plaintiff had never informed any representative of Western State of his alleged disability. Toll Decl. Exh. 10(Scott Depo. 175:25-176:4: 179:3-10). Plaintiff also reiterated his desire that Western State permit him "to join the second year class." Keller Decl. Exh. 6.

In the November 9, 1993 letter, Plaintiff also stated that he had solicited a letter confirming his alleged disability from his "administering physician." Id. On November 5, 1993, Plaintiff had written to Dr. John Feighner, asking "for a favor." Toll Decl. Exh. 8. Plaintiff asked Dr. Feighner to write to Western State on Plaintiff's behalf and tc state that "in 1992 and 1993 [Plaintiff] was a participant [in Dr. Feighner's treatment program]." Id. After Western State again denied Plaintiff readmission to Western State, Plaintiff wrote another letter to Western State sometime after March 11, 1994, again asking Western State "to reconsider [Plaintiff's] attendance at Western State." Id. {paragraph}3 & Exh. 9.

On July 3, 1995, Plaintiff filed the instant action against Western State, alleging violation of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973. On August 3, 1995, Plaintiff filed an amended complaint. On September 6, 1995, Western State filed an answer to Plaintiff's amended complaint.

Plaintiff alleges that he suffers from "a mental impairment that substantially limits one or more of his major life activities." Compl. at 2({paragraph}1). He contends that Western State violated both the ADA and the Rehabilitation Act when it refused to readmit him to the law school on July

19, 1994.[3] Compl. at 1(paragraph 1)-2(paragraph 3); Am'd Compl. paragraph 1. Finally, Plaintiff asserts that Western State could make a reasonable accommodation of Plaintiff without undue hardship. Comp. at 2(paragraphs 3-4).

In October 1995 and again in December 1995, Western State offered to readmit Plaintiff, provided that Plaintiff submit to Western State a letter from a treating physician explaining Plaintiff's disability and the reasons that Plaintiff could now succeed in law school. Toll Decl. paragraph 8 & Exh. 13. Plaintiff rejected Western State's proposals. Rather, Plaintiff has pursued the instant action, seeking $3,692,000 in damages.

Discussion

Defendant brings this motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). The court incorporates Rule 56(c) by reference. The moving party on a motion for summary judgment has the initial burden of demonstrating that summary judgment is proper. Adickes v S.H. Kress & Co., 398 U.S. 144, 159 (1970). The burden then shifts to the nonmoving party to show summary judgment is not appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). With respect to the specific facts offered

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[3] The court notes that Plaintiff's first amended complaint does not comply with Local Rule 15.1. Rule 15.1 provides that "[u]nless prior approval is obtained from the court, every pleading to which an amendment is permitted as a matter of right or has been allowed by court order, shall be retyped and filed so that it is complete in itself without reference to the superseded pleading." USDC So. DIST OF CAL. R. 15.1 (June 1995) Plaintiff's first amended complaint consists only of additions to the original complaint; it requires reference to the superseded pleading. Plaintiff did not obtain prior approval from the court to submit his amended pleading in this form. However, in light of Plaintiff's pro se status, the court will read the two complaints together.

by the nonmovant, the court does not make credibility determinations or weigh conflicting evidence and must draw all justifiable inferences in favor of the nonmovant. Id. at 255.

As noted, Plaintiff's complaint alleges violation of both the ADA and the Rehabilitation Act. Cases involving claims under the Rehabilitation Act are instructive to claims brought under the ADA. Collings v. Longview Fiber Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995),cert. denied, _U.S._, 116 S.Ct. 911 (1996). The ADA defines a disability in substantially the same terms as the Rehabilitation Act defined a handicap (now disability). Id. See also Myers v. Hose, 50 F.3d 278, 281 (4th Cir. 1995)("[W]hether suit is filed against a federally-funded entity under the Rehabilitation Act or against a private employer under the ADA, the substantive standards for determining liability are the same.") Thus, the court will consider Plaintiff's claims under the ADA and the Rehabilitation Act together.

At the outset, the court addresses the issue of when Western State's obligation to make a reasonable accommodation, if any, of Plaintiff's alleged disability arose. The ADA requires only reasonable accommodations "to the known physical or mental limitations" of an otherwise qualified individual with a disability. 42 U.S.C. 12112(b)(5)(A). See also Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996)("An employer that has no knowledge of an employee's disability cannot be held liable for not accommodating the employee."). Thus, the earliest date on which Western State could have had a duty to make a reasonable accommodation of Plaintiff's alleged disability was upon receipt of the November 9, 1993 letter in which Plaintiff first notified Western State of the existence of his alleged disability. Toll Decl. Exh. 10 (Scott Depo. 175:25-176:4; 179:3-10). Plaintiff admits in his deposition testimony that prior to November 1993 he had not informed any representative of Western State of his alleged disability. Id. Thus, before that time, Western State had no duty to accommodate Plaintiff's alleged disability, and cannot be liable under the ADA or

the Rehabilitation Act for failure to do so. See Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928, 934 (7th Cir. 1995)("Where there is not real issue that an employer who fired a disabled employee knew nothing of the disability, summary judgment in favor of the employer is appropriate.")

The ADA and the Rehabilitation Act prohibit discrimination because of a person's disability against a qualified individual with a disability. 42 U.S.C. section 12112(a); 29 U.S.C. section 794. The ADA defines discrimination under the statute to include:

> [n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability...unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity...

42 U.S.C 12112(b)(5)(A); see also Alexander v. Choate,. 105 S.Ct. 712, 720 (1985)(stating that to ensure meaningful access guaranteed by Rehabilitation Act, "reasonable accommodations" may have to be made).

To establish violation of the ADA or the Rehabilitation Act arising from Western State's refusal to readmit him to the law school, Plaintiff must show that he has a disability, that he is otherwise qualified for law school, and that the defendant refused to readmit him due to discrimination solely on the basis of his alleged disability. Champ v. Baltimore County, 884 F.Supp. 991, 994 (D.Md. 1995). See also Jackson v. Veterans Admin., 22 F.3d 277, 278 (11th Cir. 1994)("To prove discrimination under the [Rehabilitation]Act, a plaintiff must show that he or she: (1) is 'handicapped' within the meaning of the Act and relevant regulations, (2) is 'otherwise qualified' for the position in question, (3) worked for a program or activity that received federal financial assistance; and (4) was adversely treated solely because of his or her handicap.").[4] An employer who

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[4] Defendant does not argue that it does not receive federal financial assistance. Thus, the court assumes that it does for purposes of Plaintiff's Rehabilitation Act claim.

fails to provide reasonable accommodation to known physical or mental limitations of a qualified individual with a disability commits unlawful discrimination unless the accommodation can be shown to impose undue hardship. Dutton v. Johnson County Bd. of County Comm'rs, 859 F.Supp 498, 506 (D.Kan. 1994).

Here, the only accommodation of his alleged disability that Plaintiff seeks is readmission to Western State. Plaintiff Decl. at 6; see also Keller Decl. Exhs 4-6; Toll Decl Exh. 9. However, readmission is not an accommodation. See Beck, 75 F.3d at 1135 ("An accommodation is something concrete--some specific action required of the employer."); Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995)(holding that a "second chance" at employment "is not an accommodation, as envisioned in the ADA"). Rather, "[i]t is plain enough what 'accommodation means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995); see also 42 U.S.C. 12111(9)(defining "reasonable accommodation" as, inter alia, part-time or modified work schedules; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials or policies; the provision of qualified readers or interpreters; and "other similar accommodations for individuals with disabilities"). Plaintiff does not describe any other accommodation he seeks. See Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993, cert. denied, __U.S.__, 114 S.Ct. 1538 (1994) (stating that Rehabilitation Act plaintiff must describe reasonable accommodation he seeks).

In addition, Plaintiff points to no specific facts demonstrating that Defendant has refused to accommodate Plaintiff's alleged disability, i.e., that it has refused to consider making changes in its ordinary rules, facilities terms, and conditions to enable Plaintiff to attend school. Moreover, Western State has presented evidence that it twice offered Plaintiff the "accommodation" he seeks, i.e.,

the opportunity to return to law school. Plaintiff twice refused Defendant's offer. In his opposition to the instant motion, Plaintiff provides no explanation for his refusal to accept the twice-proffered "accommodation" he apparently seeks. Thus, the court is left to speculate that what Plaintiff actually seeks with his lawsuit is not the opportunity to return to law school with reasonable accommodation of his alleged disability, but rather a windfall damage award of $3,692,000. The court finds that no genuine issue of material fact exists for trial as to whether Defendant discriminated against Plaintiff on the basis of his alleged disability.

Based on the foregoing, Defendant Western State University College of Law's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

DATED: 6-6-96

s/Judith N. Keep
Chief Judge
United States District Court

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARRYL SCOTT,
Plaintiff-Appellant,

v.

WESTERN STATE UNIVERSITY COLLEGE OF LAW,
Defendant-Appellee.

No. 96-56088
D.C. No. CV-95-01056-JNK

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding
Submitted April 21, 1997**
Before: BROWNING, THOMPSON, and HAWKINS, Circuit Judges.

Darryl Scott appeals pro se the district court's summary judgment for Western State University College of Law ("WSU"). Scott claimed he was improperly dismissed from defendant's law school pursuant to the Americans with Disabilities Act, 29 U.S.C. §§ 12101-12213, and the Rehabilitation Act, 29 U.S.C. §§ 701-797. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's granting of summary judgment, see Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), Reynolds v. County of San Diego, 84 F.3d 1162, 1166 (9th Cir. 1996) (holding that we may affirm the district court on any ground supported by the record), and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, Scott's request for oral argument is denied.

Scott contends that the district court erred by granting summary judgment to WSU on Scott's claim that WSU improperly dismissed him from its law school in violation of both the ADA and the Rehabilitation Act. We disagree.

WSU dismissed Scott after his first year of law school because he failed to maintain the required grade point average ("GPA"). Scott wrote a series of letters seeking readmission. In his third letter to defendant, nearly five months after his dismissal, Scott first mentioned his alleged disability.

Under the Rehabilitation Act, a person with a disability is otherwise qualified if he "is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). To obtain relief, a plaintiff must show (1) that he is a disabled person within the meaning of the Act, (2) that he is otherwise qualified for the services sought, (3) that he is being excluded from the services solely by reason of his disability, and (4) that the program in question receives federal financial assistance. Dempsey v. Ladd, 840 F.2d 638, 640 (9th Cir. 1988).

Because Scott did not maintain the GPA required to continue at WSU, it is indisputable that he was not "otherwise qualified for the services sought." See id.; see also Davis, 442 U.S. at 406. In addition, because Scott was dismissed before WSU knew about his alleged disability, he was clearly not excluded solely by reason of his disability. See Dempsey, 840 F.2d at 640.

To succeed on his ADA claim Scott would need to prove that (1) he is disabled, (2) WSU is a private entity which owns, leases, or operates a place of public accommodation, and (3) WSU failed to make reasonable modifications in its policies, practices, or procedures to accommodate his alleged disability. See 42 U.S.C. § 12182(a) & (b). It is undisputed that WSU is a "public accommodation" within the meaning of Title III of the ADA. See 42 U.S.C. § 12191 (7)(J). Even assuming that Scott is disabled, any modification in WSU's practices would

"fundamentally alter the nature of [its]...services." See 42 U.S.C. § 12182 (b)(2)(A)(ii); See also Davis, 442 U.S. at 398-99[1/] (noting that there is no requirement that educational institutions lower or substantially modify their standards to accommodate students' disabilities).

Because Scott failed to state a prima facie case of disability discrimination under either the ADA or the Rehabilitation Act, we affirm the district court's summary judgment doe defendant. See Davis, 442 U.S. at 406; Reynolds, 84 F.3d at 1166.

Scott also contends that the district court should have allowed him to conduct further discovery before ruling on defendants' summary judgment motion. We disagree. Normally a district court's denial of discovery is reviewed for abuse of discretion. See Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1442-43 (9th Cir. 1986). When a district court enters summary judgment without ruling on a pending motion for discovery, "[b]ecause the district court did not exercise its discretion, the issue of whether or not it should have presents a legal question which is subject to de novo review." Garrett v. City & County of San Francisco, 818 F.2d 1515, 1518 n.3 (9th Cir. 1987). Because Scott cannot state a claim for relief, the district court did not err by denying the discovery motion. See Wood v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981) (per curiam) (holding that a discovery motion is properly denied if district court is convinced that plaintiff will be unable to state a claim for relief).

To the extent Scott contends that the district court erred by failing to consider his opposition to defendants' summary judgment motion, this contention lacks merit. The district court referred to Scott's opposition in its order granting summary judgment.

[1/] Because Congress intended that judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA, we may look to cases involving claims under the Rehabilitation Act. See Collings v. Longview Fibre Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995), cert. denied, 116 S.Ct. 711 (1996).

Defendant has requested attorney fees on appeal pursuant to 42 U.S.C. § 12205, on the basis that Scott's claims are frivolous. Defendant's request is denied. See Hudson v. Western Airlines, Inc., 851 F.2d 261, 267 (9th Cir. 1988); see also Miller v. Los Angeles County Bd. of Educ., 827 F.2d 617, 620 (9th Cir. 1987) (noting that it is legal error to not take into account a litigant's pro se status).

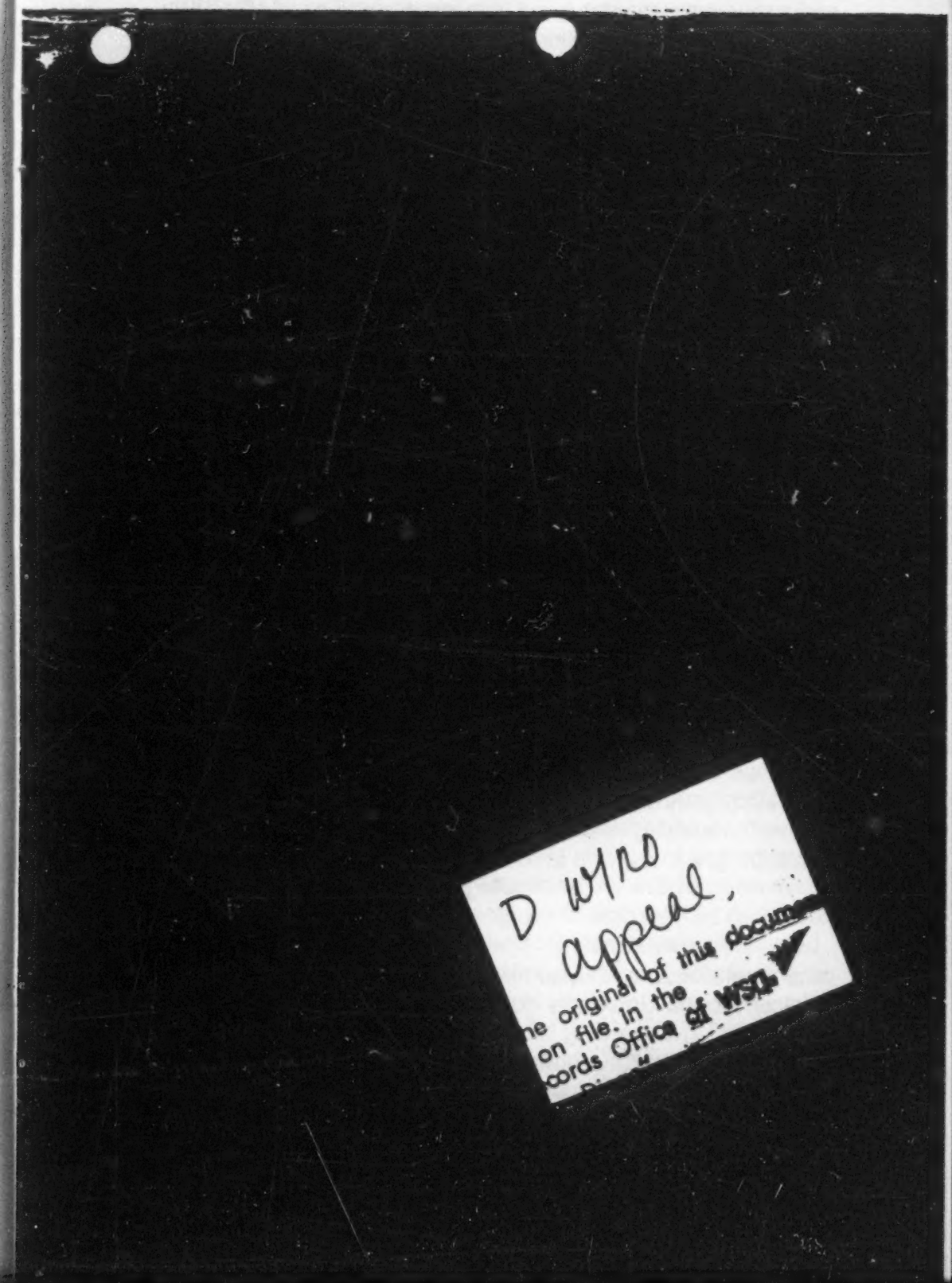
AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARRYL SCOTT, Plaintiff-Appellant, v. WESTERN STATE UNIVERSITY COLLEGE OF LAW, Defendant-Appellee.	No. 96-56088 D.C. No. CV 95-01056-JNK Southern California (San Diego) ORDER

Before: BROWNING, THOMPSON, and HAWKINS, Circuit Judges.

The petition for rehearing is denied.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cords Office of WSU

Darryl Scott
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UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL SCOTT, Plaintiff, v. WESTERN STATE UNIVERSITY COLLEGE OF LAW, et.al., Defendant,	CASE NUMBER 951056K PLAINTIFF, DARRYL SCOTT'S DECLARATION IN OPPOSITION TO TO WESTERN STATE UNIVERSITY COLLEGE OF LAW, INC.'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

I am neither a lawyer nor am I pursuing some lawyering fantasy in bringing this suit. I am simply a person believing himself cheated and seeking redress within the law. While I am not a lawyer I am confident the Court will consider this response to Defendant's Motion for Summary Judgment with the same effect it lends to said motion. The legal system must remain open to citizens without the financial means to retain counsel on their behalf.

OBJECTION

recommendation to the Admissions Committee to readmit (Plaintiff) to the University during the Spring, 1996 semester." The wording herein amounts to little more than a trap not an "accommodation" at all. In effect Dean Vandeveld would suggest to a committee that had rejected

Plaintiff three times previously to now accept Plaintiff. What would prohibit upon my acceptance of this of an offer of an "accommodation" for WSU, Inc. to again reject Plaintiff and pray res judicata barring Plaintiff from any recovery for the discrimination by WSU, Inc.?

REGARDING: DECLARATION OF JENNIFER KELLER...

At Page 4 lines 19-21, Ms. Keller misstates the Letter provided WSU, Inc. by Dr. Feighner (a true and correct copy of which is attached as Exhibit 5) in support of Plaintiff's request for readmission to WSU, Inc. Ms Keller states the Plaintiff "was not suffering from any type of mental or emotional disorder during the Spring, 1993 semester." Dr. Feighner's letter states "it is my understanding that he is fully functional and doing extremely well at the present time." Bear in mind this letter is dated February 25, 1994. The Spring, 1993 semester occurred during the months of January 1993 to May 1993. There is no evidence showing the Plaintiff was not suffering from his disability during the Spring, 1993 semester and much evidence to the contrary.

REGARDING: MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT(S)...MOTION...

At Page 2 line 24-27, Mr. Toll asserts Plaintiff was not "forthright and specific about (his) disability and about the accommodation sought." Attached are letters written by plaintiff obtained as part of Plaintiff's request for his student file

Second that Defendant had no knowledge Plaintiff was disabled until after the filing of this action is patently false. As previously stated with exhibits attached Plaintiff addressed several letters to Defendant describing his condition, the last of which was responded to by Defendant almost one full year prior to this litigation. Additionally as part of the letters, Exhibit 6, are WSU, Inc. worksheets with a mark entered prior to the words "letter f Explanation from

Prior Performance" of a "Y" which apparently means YES. This worksheet is dated 11/9/93 with another dated 7/94. This evidence would appear to be admission by WSU, Inc. of receipt and acceptance of my explanation of my time at WSU, Inc.

Third and Fourth, that Defendant offered an accommodation. Plaintiff argues Defendant's alleged "accommodation" amounts to no accommodation at all and as stated previously with exhibits attached Plaintiff never had an opportunity to respond as said "accommodation" was retracted prior to Plaintiff having an opportunity to respond.

Finally, Defendant wishes to create a Catch-22 undermining the legislative intent of the ADA and the Rehabilitation Act. The Defendant has made mush of the fact the Plaintiff "flunked out" of the Defendant's program. Were the Court to accept this assumption on its face a situation whereby the defendant defines the rules regarding who meets the prima facie requirements of the ADA and Rehabilitation Act would result. Being excluded fro a program would mean one was not "otherwise qualified"' all assumptions being skewed toward defendants. Whether or not a Plaintiff is or is not otherwise qualified is a question of fact to be determined on a